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7590 Dennis M. Flaherty, Esq. Ostrager Chong Flaherty & Broitman P.C. 570 Lexington Avenue New York, NY 10022-6894			EXAMINER TRUONG, THANH K	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN H. SCHNEIDER and STEVEN AUSNIT

Appeal 2008-1089
Application 10/042,985
Technology Center 3700

Decided: March 25, 2008

Before DONALD E. ADAMS, ERIC GRIMES, and LORA M. GREEN,
Administrative Patent Judges.

Opinion for the Board filed by *Administrative Patent Judge* ADAMS.

Opinion Concurring filed by *Administrative Patent Judge* GRIMES.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 3, 7-11, and 58-65. Claim 12, the only remaining pending claim, has been withdrawn from consideration (App. Br. 2). We have jurisdiction under 35 U.S.C. § 6(b).

INTRODUCTION

The claims are directed to a package. Claim 58 is illustrative:

58. A package comprising a receptacle having a mouth at an upper end, a flexible zipper attached to said mouth and comprising first and second fastener strips, a slider movably mounted to said zipper for alternately opening or closing portions of said first and second fastener strips depending on the direction of movement of said slider relative to said zipper, said slider having a top at a first elevation and a bottom at a second elevation lower than said first elevation, and a header enclosing said zipper and said slider, wherein said header comprises first and second side edges and first and second walls each extending from said first side edge to said second side edge, said first wall of said header comprising:

- a first line of weakness having a straight portion parallel to said zipper when said zipper is straight, said first line of weakness extending across said header at a third elevation that is lower than said second elevation; and

- a first slit defined in said first header wall by a pair of internal edges of equal length and separated by substantially no gap when said internal edges lie in a plane, said internal edges meeting at first and second termination points at opposite ends of said first slit, said first termination point being at a fourth elevation higher than said first elevation, and said second termination point being at a fifth elevation lower than said second elevation and at or near said third elevation.

The Examiner relies on the following prior art references to show unpatentability:

Keller	US 3,255,869	June 14, 1966
Deutschländer	US 4,147,583	Apr. 3, 1979
Kopp	US 5,371,997	Dec. 13, 1994
Strand	US 6,360,513 B1	Mar. 26, 2002

The rejection as presented by the Examiner is as follows:

Claims 3, 7-11, and 58-65 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Strand in view of Keller, Deutschländer, or Kopp.

We reverse.

DISCUSSION

Claim 58 is drawn to a package. The claimed package comprises

- (1) a receptacle having a mouth at an upper end;
- (2) a flexible zipper attached to the mouth that comprises first and second fastener strips;
- (3) a slider movably mounted to the zipper and having a top at a first elevation and a bottom at a second elevation lower than the first elevation. According to claim 58 the slider is for alternately opening or closing portions of said first and second fastener strips depending on the direction of movement of said slider relative to said zipper; and
- (4) a header enclosing the zipper and the slider. Claim 58 requires the header to comprise:
 - (a) first and second side edges; and

(b) first and second walls each extending from the first side edge to the second side edge.

In addition, claim 58 requires the first wall of the header to comprise:

(i) a first line of weakness having a straight portion parallel to the zipper when the zipper is straight. The first line of weakness extends across the header at a third elevation that is lower than the second elevation; and

(ii) a first slit defined in the first header wall by a pair of internal edges of equal length and separated by substantially no gap when the internal edges lie in a plane. The claim requires the internal edges to meet at first and second termination points at opposite ends of the first slit. Further, the claim requires the first termination point being at a fourth elevation higher than the first elevation, and the second termination point being at a fifth elevation lower than the second elevation and at or near the third elevation.

The Examiner finds that Strand teaches a package comprising each element of Appellants' claimed package with the exception of a slit (Ans. 3). To make up for this deficiency the Examiner relies on Keller, Deutschländer, or Kopp in the alternative. Appellants do not dispute the Examiner's findings relative to Strand. Accordingly, we find that Appellants concede that Strand teaches a package having all the elements of the package set forth in claim 58 with the exception of a slit.

As to the slit, Appellants assert that "Strand discloses a scoreline 12 having a straight horizontal section, a curved or arcuate section 13 and a tear

notch 24” (App. Br. 5). For clarity we reproduce Strand’s figure 5 below:

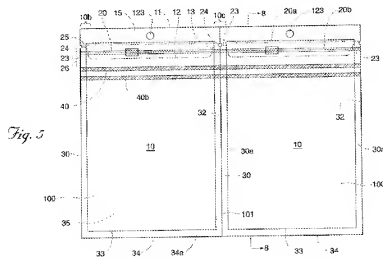


Fig. 5 “is a front plan view of a first embodiment of [Strand’s] . . . invention” (Strand, col. 6, ll. 6-7).

The Examiner refers to Strand’s “scoreline 12” as a “line of weakness (12) having a straight portion extending across the header at an elevation that is lower than a second elevation (figure 5)” (Ans. 3). Claim 58, however, requires that the internal edges of the first slit to meet at first and second termination points at opposite ends of the first slit. Specifically, claim 58 requires the:

1. first termination point to be at a fourth elevation that is higher than the first elevation. Stated differently the first termination point is above the slider that is mounted to the zipper; and
2. second termination point being at a fifth elevation lower than the second elevation and at or near the third elevation. Stated differently, the second termination point is below the slider that is mounted to the zipper and is at or near the first line of weakness.

Claim 63, the only other independent claim, on this record also requires a slit that has an orientation wherein the first termination point is at or near a first elevation, which is above the slider top; and second termination point being at or near the second elevation, which is below the slider bottom and at or near a line weakness.

As illustrated in Strand's fig. 5, the middle of the line of weakness 12 is below the zipper, but both the first and second ends, *i.e.*, the termination points, of Strand's line of weakness are located above the zipper. Thus, even if the Examiner is correct in finding that each of Keller, Deutschländer, and Kopp teach packages that comprise slits and that it would have been *prima facie* obvious to a person of ordinary skill in the art at the time of Appellants' claimed invention to have modified Strand's line of weakness to include a slit (Ans. 4); this slit would not conform to the requirements of Appellants' claimed invention. (*Cf.* App. Br. 6) (the result would lack the structure recited in Appellants' claimed invention, "namely, a slit that extends from an elevation higher than the slider top to an elevation lower than the slider bottom.")

Further, it appears that the Examiner has lost sight of the fact that Appellants' claimed invention requires both a line of weakness that extends across the header at an elevation that is below the slider *and* a slit which extends from a location above the slider to a location below the slider, which is at or near the line of weakness. The Examiner's proposed modification of Strand unites the line of weakness with the slit. According to the Examiner, such a modification provides "a means to assist and to facilitate a manual tearing-opening and the removal of the portion of the receptacle" (Ans. 4). This proposed modification does not, however, result in the arrangement of

elements as set forth in Appellants' claimed invention. While the line of weakness and the slit are located at or near the same location on one side of the package they are not on the other. Using the Examiner's reasoning the line of weakness and the slit will overlap across the package. This is not what is claimed.

In response, the Examiner asserts that "the use of the slit (20) in the present claimed invention is deemed to be a design consideration, which fails to patentably distinguish the claimed invention over the applied prior art" (Ans. 5; *see also* Ans. 8). This statement emphasizes the Examiner's failure to recognize that the slit and line of weakness in Appellants' claimed invention are oriented differently. The Examiner fails "to identify a reason [on this record] that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007).

What is missing on this record is some reason why a person would produce a package that has (1) a line of weakness at one elevation across a header and (2) a slit with a first termination point above a slider and a second termination point below a slider and at or near the line of weakness as is required by Appellants' claimed invention.

On reflection, we find that the prior art fails to suggest a package comprising the enumerated elements arranged in the manner set forth in Appellants' claimed invention. Accordingly, we reverse the rejection of claims 3, 7-11, and 58-65 under 35 U.S.C. § 103(a) as unpatentable over the combination of Strand in view of Keller, Deutschländer, or Kopp.

CONCLUSION

In summary, we reverse the rejection of record.

REVERSED

lp

GRIMES, *Administrative Patent Judge*, concurring.

I agree that the references cited by the Examiner do not support a prima facie case of obviousness, but in my opinion the majority's focus is misplaced. As I understand it, the majority does not agree with the Examiner that it would be obvious to replace only the diagonal part of Strand's line of weakness (designated 13 in Fig. 5) with a slit, without replacing the entire line of weakness (12 in Fig. 5) (*Ante* at 6-7).

Unlike the majority, I see no problem with that part of the Examiner's rejection. Both the prior art and the instant Specification teach that a line of weakness can take any of a variety of forms. See Strand, col. 3, ll. 41-46 (The "term structural weakness should include . . . structures such as perforation, scores, microperforations, and multiple laminate materials which include a layer having an area of material or materials specifically designed to be easily torn."); Spec. 5: 2-6 ("Each line of weakness for tearing off the header may comprise a line of spaced slits, a line of spaced perforations, a continuous or discontinuous score-line of thinned header material . . . , a continuous or discontinuous line of pre-weakened header material, or any equivalent structure."); *id.* at 4: 4-5 ("lines of weakness can be substituted for the slits").

Since a variety of different structures were known in the art to be equivalent for providing a line of weakness, I agree with the Examiner that those skilled in the art would have considered it obvious to replace part 13 of Strand's line of weakness with a slit, without replacing the entire line of weakness with a slit.

The problem I see with the Examiner's rejection, however, is that the structure that results from replacing part 13 of Strand's line of weakness with a slit does not meet all the limitations of the claims on appeal, as I

interpret them. Independent claims 58 and 63 both require a “line of weakness *extending across said header*” at an elevation that is lower than the bottom of the slider. The Specification makes clear that “across said header” means *all the way across* the header – from one side edge to the other side edge of the header. See Spec. 7: 23-25 (“The line of weakness 22 is preferably straight and generally parallel to the zipper line, extending horizontally from one side edge of the package to the other”). See also Fig. 1, which shows line of weakness 22 extending completely across the breadth of the package.

In Strand’s package, by contrast, line of weakness 12 changes direction at curve 13, rather than intersecting with a second line of weakness. Thus, even if the part of the line of weakness designated 13 were replaced by a slit, the resulting bag would not include a line of weakness extending all the way across the header at an elevation lower than the bottom of the slider, as required by the claims on appeal.

Because the Examiner has not explained how the cited references would have suggested all the limitations of the claims on appeal, I concur with the majority’s decision that the rejection must be reversed.

Appeal 2008-1089
Application 10/042,985

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